

2021 CAPITAL LITIGATION CONFERENCE: DELVING INTO DEFENSE EXPERTS

February 25 - 26, 2021



EXPERTS AND DIFFERENT TOPICS

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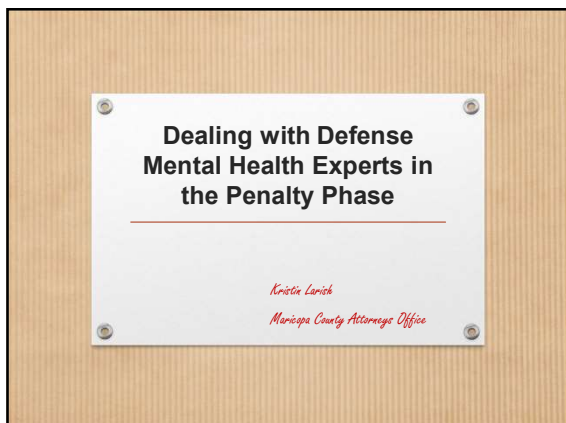
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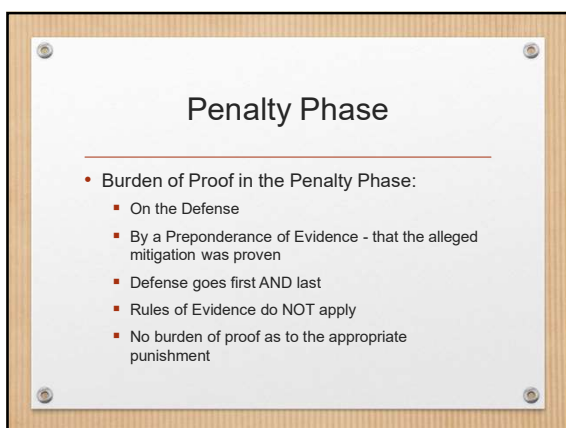
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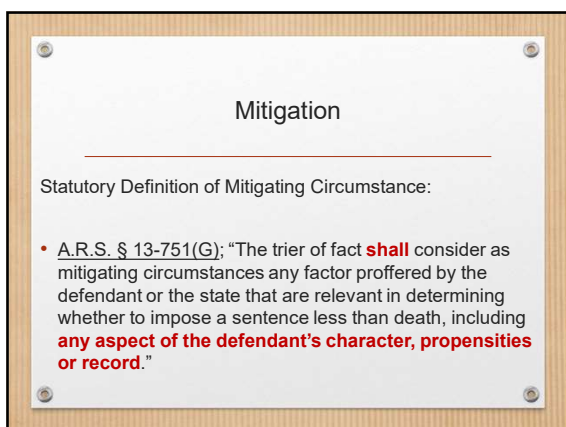
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Mitigation

Arizona Revised Jury Instructions:

- "Mitigating circumstances are any factors that are a basis for a life sentence instead of a death sentence so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record, or circumstances of the offense."
- Mitigating circumstances are not an excuse or justification for the offense, but are factors that in fairness or mercy may reduce the defendant's moral culpability.

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Mitigation

Mitigation or excuse?

- Does it reduce Defendant's moral culpability?

Nexus considerations

- Jurors must consider all mitigation
- Regardless of whether there is a causal nexus to the murder
- Lack of causal nexus may be considered in assessing quality & strength of mitigating evidence

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Mitigation Rebuttal

- The State can present mitigation and rebuttal to mitigation & evidence why Defendant should not be shown leniency
- A.R.S. § 13-752(G); "... the State may present any evidence that demonstrates that the defendant should not be shown leniency including any evidence regarding defendant's character, propensities, criminal record or other acts."

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What is Common Mental Health Mitigation?

- Mental Illness, Substance Abuse Disorders - *prior diagnosis?*
- "Amnesia" & Black Outs
- Dissociative States
- Impulsivity & Reflexivity (residual doubt or mitigation?)

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What is Common Mental Health Mitigation?

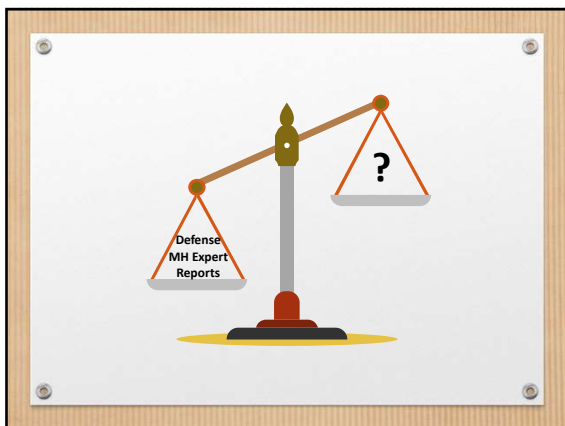
- Personality Disorders (*ASPD**)
- PTSD
- Developmental Disability Disorders; low-to-borderline IQ
- Traumatic Brain Injury (TBI)
- Neurological and/or Executive Functioning Issues
- Toxic Environment (physical, social)
- Intellectual Disability

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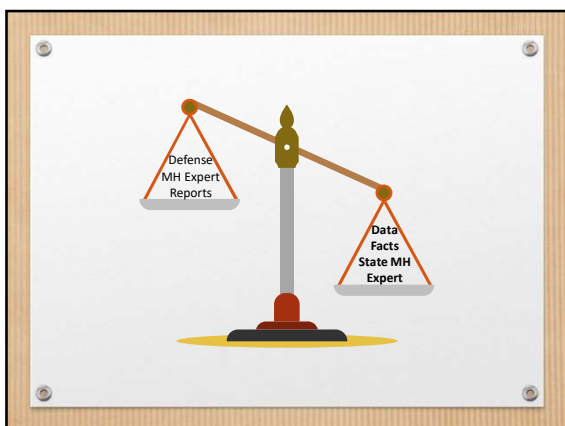
Common Brain Imaging/Tests

- CT Scans (computed tomography; multiple x-rays taken at different angles to produce cross-sectional imagery)
- PET Scans (positron emission tomography)
- fMRI's (functional magnetic resonance imaging)
- QEEG (qualitative electroencephalogram; measures electrical activity in brain; brain mapping)
- ***Most Common: claims of brain dysfunction or trauma with no imaging or testing***

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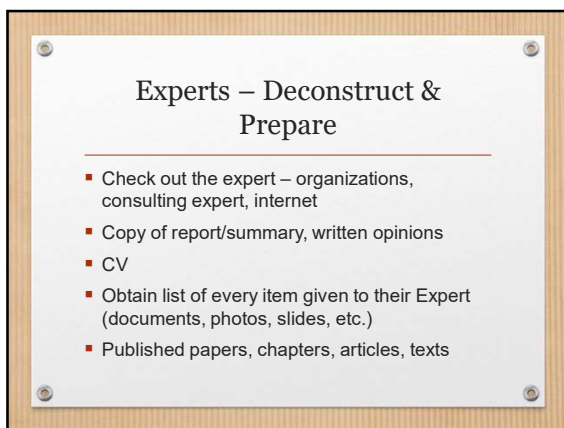
Where to Begin – Defense Experts

- Know your case; the “science,” raw data & your rebuttal
- Take control; ask Court to order the defense to provide ...
- Defense expert opinions
 - Is the expert qualified – both in the subject matter & testing?
 - Is the test/data reliable?

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Raw Data

ARS § 12-2293

- Rewritten 2004, removed wording exempting psychologist from making available raw data & psychometric testing material

American Psychological Association

- 2002 amendments deleted (similar) exemption. **See 9.04 (Release of Test Data); 9.11 (Maintaining Test Security)**
- **9.04(b):** In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

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Raw Data

- If brain scan imaging, do you have all of the images – in a readable format? Learn how to read images
- Do you have all of the 'raw data' related to the brain scan?
 - Referral question? Reports?
 - Diagnostic summaries, findings
 - Interpretations
 - NOTES
 - Do you know the chain – who did what, and why?

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Defense Experts

Pretrial interview

- Other drafts of report
- Experience as expert witness (number, %, criminal/civil, state/defense)
- Review, agree have all requested info
- **Confirm has provided all opinions**
- Identify basis for opinions – not just "literature"
- Confirm if have everything they need to form opinion
- Let them talk, **don't cross-examine**
- Direct questions about their beliefs/opinions

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Defense Experts

Cross-examination

- Prepare in advance
- Have an outline & purpose for cross (know what you need & where it is)
- Use your Expert, colleagues
- Be selective – **stay out of the weeds**
- Do not go **toe-to-toe** on science, subject area

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Defense Experts

- You will not get an expert to change his/her opinion
- Figure out if Jury will like this Expert, prepare accordingly
- Decide in advance if topics are better for your Expert than on cross-examination
- Identify errors in report

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Defense Experts

Identify problems with basis for opinions:

- **Cold Expert?**
- **Factual errors, mathematical errors**
- **Opinion based in any part on incorrect facts OR self-reported facts**
- **Opinion based upon work done by others**
- **Did they read other Experts' reports**
- **What Expert chose not to review**

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Defense Experts

- “Did you consider ... ?”
- Impeachment immediately ready
 - Do not shuffle through papers
 - Be prepared, organized
 - Other studies?
 - Contradictions from case itself?

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Defense Experts

- Can you turn this Expert into your witness?
 - Decide which points to make
 - Do not repeat direct examination
 - Make defense expert answer *your* questions – **don't get flustered**

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Can You Turn Them?

6 Q. In fact, this is the only case you've ever

7 testified in regards to crack cocaine and memory?

8 A. That I've testified to, it very well may be.

9 Q. Your knowledge about

10 mainly comes from reviewing li

11 A. Reviewing literature,

12 opposed to my own research, co

Q. In some ways it could lessen their ability to perceive. Is that fair?

A. It can.

Q. And in some ways it can heighten their ability to perceive?

A. It can.

Q. But you'll agree that everybody's different?

A. I agree.

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Defense Experts

- Case-based bias (*is fee arrangement really important to your argument?*)
- **Don't' get greedy**
- **Know what to cover with your Expert**
- Know when to stop
- Plan your last question, make it a good one

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New or Changing Opinions

Only works if you asked magic Qs in interview & have transcript:

- "Doctor, have you told me all of the opinions you have formed in this case?"
- "Will you be testifying to any opinions you have about this case that you have not shared with me during this interview?"
- "Have you reviewed all of the materials/studies, etc. you intend to?"
- "You are aware this is my one time prior to trial to learn of all of your opinions and the basis for your trial testimony, correct?"

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New or changing opinions

- "If you review any other material will you be sure that I know about it before you testify so I don't hear about it for the 1st time when you are on the witness stand?"
- "If you form any additional opinions in this case will you be sure that I know about it before you testify so I don't hear them for the 1st time when you are on the witness stand?"

Decide how best to handle new opinions expressed for first time in front of the jury. You may want to consider bringing this to the court's attention once establish new opinion/material never disclosed pretrial

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Be Thorough, Cautious, Factual & Prepared

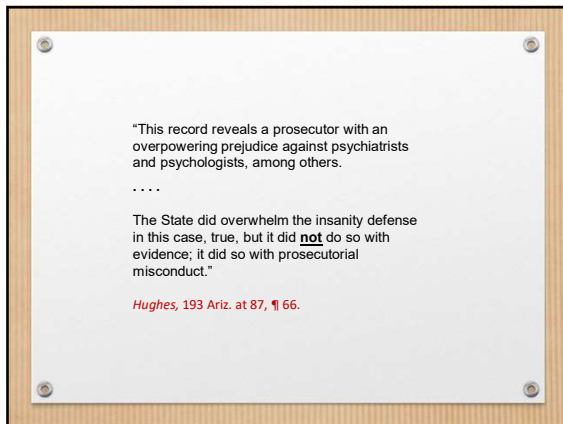
- Cross must be based on articulable facts & data
- Do **NOT** personally attack Expert
- Do **NOT** violate court rulings
- Have *immediately available* every piece of evidence supporting cross
- Applies to Closing Arguments too

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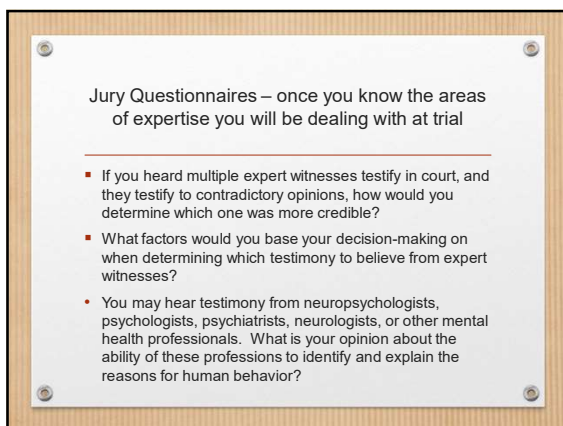
Be Thorough, Cautious, Factual & Prepared

- *State v. Hughes*, 193 Ariz. 72 (1998)
- *In re Zawada*, 208 Ariz. 232 (2004)
- *State v. Roque*, 213 Ariz. 193 (2006)
- *State v. Velasquez*, 216 Ariz. 300 (2007)
- *State v. Arias*, 248 Ariz. 546 (2020)
- ✓ Please remember you are under a magnifying glass in your handling of Defense Experts, as well as every aspect of a capital case
- ✓ Use data, facts, your MH Expert testimony

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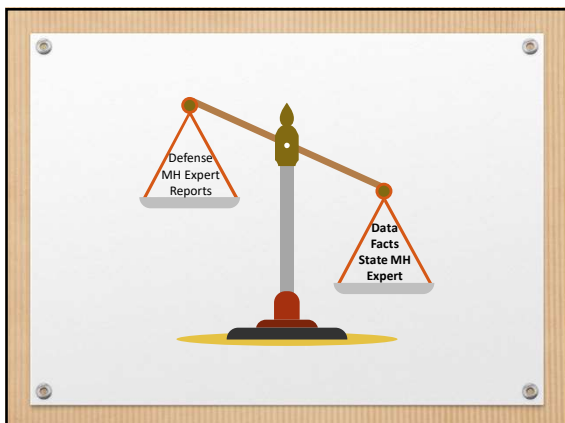
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1. Have the Defense Expert's opinions been proven?

Preponderance of the Evidence

- Defense Burden; more likely true than not

The Defendant bears the burden of proving the existence of any mitigating circumstance that the Defendant offers by a preponderance of the evidence. That is, although the Defendant need not prove its existence beyond a reasonable doubt, the defendant must convince you by the evidence presented that it is more probably true than not true that such a mitigating circumstance exists. In proving a mitigating circumstance, the Defendant may rely on any evidence already presented and is not required to present additional evidence.

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2. Is the Mental Health Evidence relevant?

- Cannot be swayed by mere sympathy
- Cannot be a gut feeling
- MUST BE BASED ON THE EVIDENCE**

You must not be influenced at any point in these proceedings by conjecture, passion, prejudice, public opinion or public feeling. You are not to be swayed by mere sympathy not related to the evidence presented during this phase.

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3. Does the Mental Health Evidence have value or connection?

- Safest to read directly from jury instructions

Mitigating circumstances may be offered by the Defendant or State or be apparent from the evidence presented at any phase of these proceedings. You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.

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3. Does the Mental Health Evidence have value or connection?

- Does the mitigation reduce Defendant's understanding – right from wrong?
- Does the mitigation reduce his/her blameworthiness for the murder? Given all the harm done?
- What impact did it have on Defendant when he decided to ...?

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Mitigating circumstances may be offered by the Defendant or State or be apparent from the evidence presented at any phase of these proceedings. You are not required to find that there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence. You must disregard any jury instruction given to you at any other phase of this trial that conflicts with this principle.

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4. Is the Mental health evidence sufficiently substantial to call for leniency?

- In light of all of the evidence (facts, aggravating factors)
- Reasoned judgement
- **IS IT ENOUGH?**

In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors is when evaluated in connection with the totality of the aggravating factors and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

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If There's Time ...

Thoughts on challenging brain imaging testimony:

- Indirectly measures brain activity
- Pointing to parts of the brain that "light up"
- Defective research methods
- Limitations
- Correlation(s)?
- CAUSALITY

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QUESTIONS?

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